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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1137

R. R. STONE, TRADING AS STONE TOWING LINE, CHARTERER *pro hac vice* OF GAS SCREW TUG STONE 6,
Petitioner,

vs.

DIAMOND STEAMSHIP TRANSPORTATION CORPORATION AND TEXAS GULF SULPHUR COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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April 10, 1946.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1137

R. R. STONE, TRADING AS STONE TOWING LINE, CHARTERER *pro hac vice* OF THE GAS SCREW TUG "STONE NO. 6," *Petitioner*,

vs.

TEXAS GULF SULPHUR COMPANY, INC., OWNER OF A CARGO OF SULPHUR LATELY LADEN ON BOARD THE S. S. "SEVERANCE," AND DIAMOND STEAMSHIP TRANSPORTATION CORPORATION, AS OWNER OF THE S. S. "SEVERANCE."

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, R. R. Stone, trading as Stone Towing Line, charterer *pro hac vice* of the gas screw tug STONE 6, respectfully shows:

Summary Statement of the Matter Involved

On November 23, 1940, the steamship SEVERANCE while being assisted by the tug STONE 6, with the master of the tug

on the bridge of the steamship, sank in or near the opening of the Northwest Cape Fear River bridge, near Wilmington, North Carolina. Claims were filed by the bridge owner, the steamship owner and the cargo owner aggregating $183,550.00, plus interest. The petitioner, R. R. Stone, as bare boat charterer of the tug, and Thomas H. Stone, by his guardian, the Peoples Savings Bank and Trust Company of Wilmington, North Carolina, filed a joint petition for exoneration from and limitation of liability in the United States District Court at Wilmington, North Carolina.

The case was tried before the Honorable I. M. Meekins, District Judge, at Elizabeth City, North Carolina, on May 29, 30, 1944. At the trial fourteen witnesses testified,—ten orally in open court, and four R. R. Stone, Franklin E. Hardy, Master of the SEVERANCE, Arthur Cooper, Third Mate of the SEVERANCE, and John Warwick Cooper, deckhand on the tug STONE 6, testified by deposition. The Master and Third Mate of the SEVERANCE were the only members of her crew who testified.

(A) TRIAL FACTS

On November 24, 1944, the District Judge (R. 105) addressed a letter to proctor for R. R. Stone, petitioner, stating:

> "* * * After much study of the case and checking the authorities cited by all parties thereto and after much thought and consideration, I have reached a conclusion in the above captioned cause.
>
> I am of the opinion, and so hold, that the petitioner is without fault and therefore should be exonerated from all liability.
>
> In view of the foregoing you are at liberty to present to me for my consideration, a suitable Decree embracing therein Findings of Fact and Conclusions of Law.

I am sending a copy of this letter to Hill, Rivkins and Middleton, Proctors for Texas Gulf Company, Inc., 60 Wall Street, New York 5, New York; Mr. George Rountree, Proctor for the Diamond Steamship Transportation Corporation, Wilmington, North Carolina, and Mr. Isaac C. Wright, who represents the State Highway Commission of North Carolina, Wilmington, North Carolina."

* * * * * * *

"P. S. I suggest that you send copy of the proposed Decree to each of your adversary proctors."

On December 4, 1944, the Findings of Fact, and Conclusions of Law and Final Decree, was mailed to the District Judge (R. 107) with copies in same mail to all other proctors in the case. On December 8 and 9 (R. 109-110) pages 2 and 7 of the Findings of Fact as first submitted were retyped at the request of the District Judge.

After being advised on December 9, 1944 (R. 114) that proctors for the steamship and the cargo did not desire to file a "counter decree and findings of fact," the District Judge, on December 12, 1944 (R. 115) duly entered the Findings of Fact, Conclusions of Law and Final Decree herein.

(B) Facts in re Appeal

The respective owners of the steamship and cargo duly appealed to the United States Circuit Court of Appeals, Fourth Circuit, and that Court, on December 27, 1945, announced its decision (Opinion, R. 148, 167) setting aside the decree of the District Court and remanding the case to the District Court for further proceedings consistent with its opinion.

On March 12, 1946, the said Circuit Court of Appeals entered its order (R. 182) overruling the petition for a rehearing duly filed herein (R. 169) by said R. R. Stone, petitioner.

On March 18th, 1946, said R. R. Stone, petitioner, petitioned said Circuit Court of Appeals for a stay of the mandate herein, and said court, by its order herein entered on March 18, 1946 (R. 183) stayed the issuance of the mandate herein, provided a petition for a writ of certiorari to this Honorable Court be filed within thirty days, and that the mandate be stayed pending the action of this Honorable Court upon said petition.

(c) Collision Facts

The Severance is a turret type single screw steamship, 366 feet long, 53 feet beam and 24.9 feet deep (R. 20).

The tug Stone 6 is a diesel vessel, 84.9 feet long, 20.5 feet beam and 6.3 feet deep, with an engine of 200 horsepower and 300 horsepower when gagged up (R. 20).

The State highway bridge across the Northwest Branch of the Cape Fear River near Wilmington, North Carolina, has an opening 120 feet wide (Dosher, R. 15; Petitioner's Ex. 4). There was a wooden fender piling system extending Easterly from the two abutments of the bridge, respectively. The channel is about 200 feet wide at the Easterly approach to the bridge, and the channel depth approved by the United States War Department is 25 feet (Petitioner's Ex. 4).

The steamship Severance was partially loaded with a cargo of sulphur in bulk and had a draft of 19′-10″ forward and 20′-3″ aft. The weather was clear and fine, and there was no wind that could affect the navigation of either the steamship or the tug (Dosher, R. 20). The tide at 11:00 o'clock A. M., at low water was at a height of .5 of a foot below mean low water. At 11:45 o'clock A. M., the tide had risen to a half foot of mean low water, and these heights agree with normal or predicted height, and do not indicate freshet conditions at the Tide Station (Dosher, R. 24; Whitney, R. 48, 49). The Severance was anchored in the

"Basin" at Wilmington (Jos. Norman Cooper, R. 63), and Captain Fred Dosher with the tug STONE 6, pursuant to a contract with the steamship's agent for the tugboat's service, went to the SEVERANCE at her anchorage to assist her to Navassa (Dosher, R. 11; Stone, R. 6, 7) which is located Westerly up the river from the said bridge opening. Captain Dosher went on the bridge of the SEVERANCE, and after the anchor was weighed, got under way at about 11:15 o'clock A. M., with the engines of the SEVERANCE at "Slow Ahead," and then after a short interval, they kicked to "Half Ahead" for steerageway, and from then on at "Slow Ahead" (Dosher, R. 25, 26). The tug was ahead of the SEVERANCE on a slack 6-inch hawser, about 125 feet long (Dosher, R. 24).

The tug and the SEVERANCE approached the opening of the said bridge and had reached a position where the bow of the SEVERANCE was about between the Northerly and Southerly fender piling, and was headed directly through the center of the opening, with the bow of the tug about under the Easterly edge of the bridge overhead, when the SEVERANCE suddenly sheered to her port and collided with the fender piling at the Southwest corner of the bridge opening (Dosher, R. 23). The steamship's rudder was instantly put hard right, and her engines signalled "Full Speed Astern," and the tug was signalled to proceed to pull at full speed to the ship's right (Dosher, R. 21). The ship's engines did not start in reverse until just at the moment the ship hit the fender piling, and at about the same instant the ship hit the fender piling the line (which was the ship's line) leading from the ship to the tug, parted, and the ship brushed the fender piling and came to a stop with her hull in the position indicated on "Texas Gulf Sulphur Ex. 1," which shows a little short of being under the Eastern side of the bridge, and with no contact between the hull of the

ship and the abutment inshore of the fender piling (Dosher, R. 27) Diver Sherman found that a pile of rocks outshore of the fender piling by a distance of about 50 feet had torn a hole in the bottom of the ship about 20 feet long, and 5 or 6 feet wide immediately adjoining the port side of the ship's keel (Sherman, R. 34) the position and existence of said rocks was not charted and *was not known by anyone* prior to the disaster. At the time the ship started to sheer, her speed was about 2 miles per hour (Dosher, R. 28).

Reasons Relied On for the Allowance of the Writ

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of his petition:

There are several important holdings in the opinion (R. 148) of the United States Circuit Court of Appeals, Fourth Circuit, which are contrary to and are in conflict with decisions of this Honorable Court, the United States Circuit Court of Appeals, Second Circuit; the United States Circuit Court of Appeals, District of Columbia, and the United States Circuit Court of Appeals, Ninth Circuit.

I

In its opinion (R. 150) the Circuit Court of Appeals, Fourth Circuit, said:

> "• • • No opinion was filed by the District Judge, who wrote the proctor for respondents that the District Judge found the respondents without fault and therefore relieved of liability. In this letter the District Judge requested the proctor for respondents to present findings of fact and conclusions of law. The District Judge then practically in toto, adopted these findings and conclusions.
>
> "This practice is not to be commended. It has been condemned by many courts as not living up to the provisions of Admiralty Rule 46½: 'In deciding cases

of admiralty and maritime jurisdiction, the court of first instance shall find the facts specially and state separately its conclusions of law thereon'. See Irvine v. The Hesper, 122 U. S. 256; Petterson v. New York Central Railroad Co., 126 F. (2d) 992; Schilling v. Schwitzer, 142 F. (2d) 82; City of New York v. McLain Lines, 147 F. (2d) 393; Chicago v. Moore, 259 Fed. 490. We do not hold that the practice affords a ground for reversing the decree of the District Court. We content ourselves by observing that these findings of fact and conclusions of law are not, at our hands, entitled to the same weight and dignity which they would have possessed had they represented the unfettered and independent judgment of the trial Judge * * *."

The above holding is in conflict with the decision of the United States Circuit Court of Appeals, Second Circuit, in the case of The Dynamic, 123 F. (2d) 999, 1000, 1001. There the Court held that the requirement of Admiralty Rule 46½ does not imply that the District Court is not privileged to seek such aid of counsel, both as to facts and law, as it thinks desirable prior to, and as a step in the decision. In this case the Second Circuit also called attention to the right and privilege provided by Rule No. 52(b) F. R. C. P., for the right of counsel to request amendment of, or additional findings,—a right which was declined by counsel for the damage claimants in the case at bar.

It is in conflict with the decision of the Circuit Court of Appeals, District of Columbia, in the case of Schilling v. Schwitzer-Cummins Co., 142 F. (2d) 82, 83. There it is held that even if it were an improper practice for the trial court to direct counsel to prepare findings, such fact would not authorize the appellate court to review evidence *de novo*, and that it is not the function of the appellate court to assume the powers of the trial court,—a function which

the Circuit Court of Appeals for the Fourth Circuit in the case at bar, has very definitely done.

It is in conflict with the decision of this Honorable Court in the case of United States v. Crescent Amusement Company, 323 U. S. 173, at 184, 185.

There this Honorable Court after expressing its disapproval of the Trial Judge's adoption of much of the brief of the counsel for the Government in the form of "Findings of Fact", definitely said that notwithstanding they were findings provided by counsel, they became those of the Trial Judge when he signed them, and as there was evidence to support them, they should not be disturbed.

II

After the above mentioned holding the Circuit Court of Appeals, Fourth Circuit, brushes aside uncontradicted testimony of responsible witnesses because it is "not favorably impressed" therewith and ignores other important evidence, and then proceeds (Opinion, R. 153) to treat the decree of the District Court as "wholly vacated" and finds facts in the reverse of those found by the Trial Judge.

In the case of the City of New York v. National Bulk Carriers, Inc., 138 F. (2d) 826, 827, the Second Circuit went so far as to threaten to discipline counsel who persisted in admiralty appeals in cases where there was evidence to support the findings of the Trial Judge on disputed issues of fact.

In the case of The Megler, 153 F. (2d) 237, the Ninth Circuit held that where the record revealed no inherent improbable or plain error to detract from the findings of the trial court, the Circuit Court of Appeals would not be justified in interfering with the finding.

The power of the Circuit Court of Appeals to treat the

decree of the District Court as fully vacated is considered subject to grave doubt since the adoption of Rule 46½. That doubt is well stated by Circuit Judge Denman, speaking for the Ninth Circuit, in the case of The Ernest H. Meyer, 84 F. (2d) 496, where after putting the question as to whether Rule 46½ was intended by this Honorable Court to have abolished new trials and required the Circuit Court of Appeals to consider admiralty appeals as if brought up by a writ of error, said:

> "* * * *until in this or some other case the Supreme Court shall clear up the doubt,* we therefore adhere to the rule as stated in The Andrea F. Luckenbach (C. C. A.) 78 F. (2d) 827, 828, as follows: 'The well established rule is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact, will not be disturbed by the Appellate Court, unless clearly against the weight of evidence.'" (Italics supplied.)

III

In its opinion (R. 152) the Circuit Court of Appeals, Fourth Circuit, said:

> "We start with the rule that when the "Severance" in complete control of Dosher in waters with which he was familiar, on a clear day with a light wind, ran into a readily visible stationary object, the piling of the bridge, this raises a presumption of negligence on Dosher's part that at least calls for some reasonable explanation of the collision. As far back as 1877, Mr. Justice Clifford said in The Virginia Ehrman, 97 U. S. 309, 315:
>
> "Vessels in motion are required to keep out of the way of a vessel at anchor, if the latter is without fault, unless it appears that the collision was the

> result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practicable precautions."
>
> "See, also, The Louisiana, 70 U. S. 164, 173; The Bertha F. Walker, 220 Fed. 667, 668; Savannah & New York Transportation Co. v. Klaren Bridge Co., 252 Fed. 499, 504; United States v. Norfolk-Berkeley Bridge Corporation (C.C.A. 4), 29 F. (2d) 115, 126; Louis Dreyfus v. Patterson Steamship, 43 F. (2d) 824, 825."

The quotation from the case of The Virginia Ehrman, 97 U. S. 309, 315, followed by the citation of cases which involve only collisions between moving vessels and stationary objects or anchored vessels, conclusively establishes that the Circuit Court of Appeals for the Fourth Circuit has applied to the case at bar, an inapplicable presumption.

In the case at bar the damage claimants are those of the cargo and steamship owner against petitioner R. R. Stone as an independent contractor and the employer of Dosher, the tugmaster, and therefore the burden of proof is upon the damage claimant to establish by affirmative evidence that Dosher breached his duty to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of a similar service. The decision of this Court in the case of The White City, 285 U. S. 195, establishes this statement to be correct. Indeed the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of Standard Transportation Co. v. Wood Towing Corporation, 64 F. (2d) 282, where the facts were quite similar to that in the case at bar, so states the rule at page 284.

IV

The Circuit Court of Appeals, Fourth Circuit in its opinion (R. 160) said:

> "It would thus seem that the knowledge and privity of H. B. Stone is that of R. R. Stone. The Robert H. Smith, 3 F. Supp. 531; 1943 A. M. C. 333, 49 F. Supp. 929; 1940 A.M.C., 367, 140 F. (2d) 491; The Chickie, 1944 A. M. C., 635, 54 F. Supp. 19; Eastern Steamship Co. v. Great Lakes Dredge and Dock Co., 256 Fed. 497."
>
> "Moreover, H. B. Stone, the General Agent in charge of his father, the owner of the business, testified expressly that he told Dosher to take the tug Stone 6 and get the "Severance" at her anchorage; and he actually saw these vessels pass by. This evidence clearly shows that Stone knew or should have known that a tug which proved inadequate was to be used; and this constituted negligence on his part."

This Honorable Court has stated the true and applicable rule in the case of Coryell v. Phipps, 317 U. S. 406, where this Court said:

> "In the case of individual owners it has been commonly held or declared that privity as used in the statute means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury. The 84-E, 2 Cir., 296 F. 427; Warnken v. Moody, 5 Cir., 22 F. 2d, 960; Flat-Top Fuel Co. v. Martin, 2 Cir., 85 F. 2d 39; and see La Bourgogne, 210 U. S. 96, 122, 28 S. Ct. 684, 673, 52 L. Ed. 973; Richardson v. Harmon, 232 U. S. 96, 103, 32 S. Ct. 27, 39, 56 L. Ed. 110; 3 Benedict, Admiralty (6th Ed.), Section 489. That construction stems from the well settled policy to administer the statute not *"with a tight and grudging hand"* (Mr. Justice Bradley in Providence & New York S.S. Co. v. Hill Mfg. Co., 109 U. S. 578, 589, 3 S. Ct. 379, 385, 617, 27 L. Ed. 1038) *but broadly and liberally" so as "to achieve its purpose to encourage investments in shipbuilding and to*

> *afford an opportunity for the determination of claims against the vessel and its owner.*" Just v. Chambers, 312 U. S. 383, 385, 81 S. Ct. 637, 690, 85 L. Ed. 903. And see Larsen v. Northland Transportation Co., 352 U. S. 20, 24, 54, S. Ct. 584, 585, 78 L. Ed. 612; Richardson v. Harmon, supra, 222 U. S. page 103, 32 S. Ct. page 29, 56, L. Ed. 110." (Italics supplied.)

The error of the Circuit Court of Appeals in this holding is clearly exhibited by its citation of the following cases: The Robert H. Smith, 3 F. (2d) 531; The Margaret W., 49 F. Supp. 929; 140 F. (2d) 491; The Chickie, 54 F. Supp. 19; Eastern Steamship Co. v. The Great Lakes Dredge & Dock Co., 56 F. 497. In each of those cases the petitioner for limitation of liability was a corporate owner, while in the case at bar the petitioner, R. R. Stone, is an individual, and as this Court has held in Coryell v. Phipps, supra, only the actual knowledge of petitioner, R. R. Stone, will constitute privity on his part. And by the uncontradicted and indubitable testimony of petitioner, R. R. Stone, he knew nothing whatever about the contract for the "tugboat service," or its performance, until after the disaster.

V

In its opinion (R. 159) the Circuit Court of Appeals, Fourth Circuit, held that petitioner, R. R. Stone, was not a charterer of the tug STONE 6, but was a bailee or trustee *ex malficio*.

Such holding upon the record in this case, is in conflict with the decision of Judge Brown in *Moore* v. *Sun Printing and Publishing Ass'n*, 95 F. p. 487, affirmed by this Court in 183 U. S. 642. There Judge Brown said: "• • • The charter is equally valid if by parole only, and parole charters are constantly enforced in this court. • • •"

After stating (Opinion, R. 159) that "The only evidence to prove the alleged oral charter was that of the most keenly interested party," the Circuit Court of Appeals proceeds to hold that notwithstanding the uncontradicted evidence of petitioner, R. R. Stone, no charter party existed because there was no evidence of payment of charter hire, and because in the case of The Pejepscot he had described himself in a libel as "owner" of the tug. Mr. Stone (R. 74) explained this, showing that he clearly had not meant in the Pejepscot libel that he was the "owner," but that he was the "chartered owner." He is thoroughly solvent and to say that no charter party existed because he had not paid charter hire, would by the same token, deny that the guardian of the incompetent Thomas H. Stone had no right to sue petitioner for the arrears of charter hire. There is no evidence of any complaint by the guardian of Thomas H. Stone about nonpayment of the charter hire, and that nonpayment cannot even suggest, much less be a conclusive negative of the existence of the charter. The case of *Jones & Laughlin Steel Corporation* v. *Vang*, 1933 A. M. C., 1303, and 1934 A. M. C. 1308 cited by the Circuit Court of Appeals loses all applicability in this case when it is understood that the court there was discussing a holding that a Steel Company which had possession of a coal company's barge, merely to unload, was not a charterer of that barge. Furthermore the charter party was in effect nearly six months before Thomas H. Stone became an incompetent.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals, Fourth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full

and complete transcript of the record and all of the proceedings in the case numbered and entitled on its docket,

No. 5389

TEXAS GULF SULPHUR COMPANY, INC., owner of a cargo of sulphur lately laden on board the S. S. "SEVERANCE," and DIAMOND STEAMSHIP TRANSPORTATION CORPORATION, as owner of the S. S. "SEVERANCE,"

Appellants,

v.

PEOPLES SAVINGS BANK AND TRUST COMPANY, a corporation, guardian of Thomas H. Stone, an incompetent, as owner, and R. R. STONE trading as STONE TOWING LINE, as character *pro has vice,* of the gas screw tug "STONE NO. 6",

Appellees

and that the decision of the United States Circuit Court of Appeals, Fourth Circuit, announced by it on December 27, 1945, and on which said Court overruled a duly filed motion for a rehearing, on March 12, 1946, may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

R. R. STONE, trading as STONE TOWING LINE, charterer *pro hac vice* of the Gas Screw Tug STONE 6,

By JOHN W. OAST, JR.,
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